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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICKY ALYN GROSECLOSE, Defendant and Appellant.	A151317 (Solano County Super. Ct. No. FCR313134)

Ricky Alyn Groseclose (defendant) appeals from a judgment entered after a jury convicted him of five counts of lewd acts upon a child (Pen. Code, § 288, subd. (a))[1] and the trial court sentenced him to 16 years in prison. He contends: (1) the court abused its discretion "and rendered the trial unfair" by excluding certain testimony regarding the victim's prior misconduct; (2) there was insufficient evidence to support the conviction on all five counts; and (3) the court should have stayed the consecutive sentences on four of the five counts. We reject his contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 7, 2015, an information was filed charging defendant with five counts of lewd acts upon a child (§ 288, subd. (a); counts 4 to 8). The information also charged his codefendant, Michelle S., with two counts of sex with a child age 10 and under (§ 288.7, subd. (a); counts 1, 2) and one count of continuous sexual abuse (§ 288.5, subd. (a);

[1] All further, undesignated statutory references are to the Penal Code.

count 3). The victim of all of the charged offenses was R.W., who is codefendant Michelle S.'s son.

On January 15, 2016, the trial court severed the case and ordered defendant's trial to trail Michelle S.'s trial. It appears a judgment of conviction was entered against Michelle S. in her case, but the record does not reflect the details of that judgment.

In 2013, when R.W. was nine or ten years old, his parents divorced and began sharing custody of him and his younger brothers, who were about eight and six years old. The boys spent Mondays through Fridays with their mother, Michelle S. (Mother), in Vacaville, California, and spent the weekends with their father in Pittsburg, California.

When the boys were with Mother, they slept in one of the two bedrooms in a two-bedroom apartment and Mother slept in the other. At some point, Mother began having "naked time," during which she would take her clothes off and have the boys take and keep their clothes off while in the apartment.

One night when R.W. was 10 years old, R.W.'s younger brothers were asleep in the boys' bedroom when Mother called R.W. into her bedroom. R.W. walked in. Mother was naked and told R.W. to take his clothes off. He did not want to comply but he did because he had been taught to "always obey your parents."

Mother touched R.W.'s penis until it was erect, then moved herself closer to him and inserted his penis into her vagina. R.W. was "shocked" and did not understand what was going on. He later learned this was "sex."

A couple of nights later, the same thing happened. He did not remember how many more times this happened at the apartment, but it was "[a]lways" in Mother's bedroom. Mother told R.W. not to tell anyone about it and said that if he did, she would never see him or his brothers again. R.W. did not tell anyone because he thought he and his brothers "needed a mother."

In the summer of 2014, Mother and the boys moved out of the apartment and into defendant's three-bedroom house in Vacaville. R.W. was happy about the move because defendant's house was nicer than the apartment. R.W. was also familiar with defendant, whom he had known for a couple of years. Defendant worked at a store that R.W. and

his father visited regularly to purchase R.W.'s father's work supplies. Defendant had also visited Mother and the boys at their apartment a number of times.

When Mother and the boys first moved into defendant's house, R.W. and his brothers shared one bedroom and Mother and defendant each had their own bedrooms. One of defendant's adult sons was also staying there and slept in the living room.

About a month and a half after the move, Mother began calling R.W. into her bedroom again. R.W. did not want to go into her bedroom because he knew what might happen, but he complied. He and Mother had sex "a lot of times," about once a week.

In December 2014, defendant approached R.W. and asked if it was "okay" if he dated Mother. R.W. responded "yes" because "I didn't feel like I was really in charge of it." Shortly thereafter, defendant and Mother began dating, and Mother moved into defendant's bedroom.

One night, Mother called R.W. into her and defendant's bedroom. When R.W. walked in, Mother and defendant were both there. Mother told R.W. to take his clothes off, then "had me have sex with her." Defendant stood in the corner of the room the entire time. After 15 or 30 minutes went by, Mother said, "Okay. That's enough," and R.W. left the room.

Mother continued to have sex with R.W. about once a week after she began dating defendant. She told R.W. to send a text message to defendant every time she and R.W. had sex. She would "hand [R.W. his] phone and [instruct him to] tell [defendant]."

Defendant also sent text messages to R.W. that were sexual in nature, including messages in which he instructed R.W. to have sex with Mother. Mother would look at these messages and say, "You heard the man," or "Well, that's what he said," and proceed to have sex with R.W. R.W. did not remember how many times this happened, but when asked to provide an estimate, he responded, "Four or five times."[2]

[2] The detective who interviewed R.W. testified that when she first asked R.W. "how many times he received a text message from [defendant] and then had sex with [Mother]," R.W. said it happened " 'a lot[.]' " When the detective asked, " 'Was it more than five times,' " R.W. responded, " 'A lot more than that[.]' " She then asked him to

Some of the text messages between defendant and R.W. were shown to the jury. On February 13, 2015, R.W. wrote, "Rick I did your girlfriend[.]" Defendant responded, "It's been awhile huh did you enjoy it . . . ." "Hell you should do it again stud . . . ."

On February 14, 2015, R.W. wrote, "Its your turn when your here I had to rush . . . ." (*Sic.*) Defendant responded, "Th[e]n do he[r] again before you leave . . . ." R.W. responded, "Ok finished she liked it[.]" Defendant wrote, "Arnt [*sic*] you the stud did you like it," and, "Good job son[.]"

On February 27, 2015, after R.W. sent a message to defendant to tell him he had had sex with Mother, defendant wrote, "[D]o her again stud," and, "Do he[r] good son make me proud[.]" R.W. responded, "Finished[.]" Defendant wrote, "She likes that big dick of yours you do a good job she says how many times you make her cum w[e] will have to plan another Saturday and both do her[.]" "Talk to her about it so we can plan it . . . ."

That same day, defendant sent a message asking R.W. whether his father (Father) would "share" his girlfriend too. R.W. responded, "He won't," and defendant wrote, "Poor [R.W.]. Just remember, I will share anytime you want it."

R.W. confirmed at trial that these text message exchanges occurred between him and defendant, and that they were in reference to R.W. and Mother having sex. He testified that there was a period of almost two weeks between February 14 and 27, 2015, when there were no sex-related text messages because Mother had undergone gallbladder surgery and she did not make him have sex with her during her recovery.

R.W. further testified that there were more text messages between him and defendant but that Mother often made him delete the messages. The deleted messages were "also of [defendant] telling [R.W.] to have sex with [Mother], and [R.W.] telling [defendant] that [he] had sex with [Mother.]" R.W. explained that the messages

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estimate, and he said "90." The detective testified that based on her training and experience, it is "common for children to not be able to accurately estimate the amount of times [something] happens a lot" and for children who are suffering ongoing abuse to say " 'a lot.' "

beginning on February 13, 2015, were still on his phone when he turned the phone over to police because Mother was not checking his phone during that time.

A police officer assigned to the investigation section's digital evidence unit testified that he exported text messages from R.W.'s phone but that there probably were deleted messages that could not be recovered. Messages become unrecoverable because data is purged and/or overwritten when phones are turned on and off.

In early March 2015, Father discovered some of the messages while looking through R.W.'s phone. He asked R.W. what was going on, and R.W. told him that Mother was making him have sex with her. Father took R.W. to the police department, where R.W. was interviewed on three separate occasions.

On cross-examination, R.W. admitted he was suspended from school twice and was once caught stealing alcohol from Father's house. He also admitted he stole a pocketknife and a cigarette lighter from Father's house and gave them to defendant. He acknowledged he looked for and watched pornography on the Internet for "a couple hours[]" while living at defendant's house.

Defendant took the stand and testified that about a month after R.W.'s family moved into his house, R.W. asked defendant whether he had a girlfriend. Defendant did not have a girlfriend, but he found a picture of a woman on the Internet and told R.W. that she was his girlfriend. Defendant did not know why he made this up. R.W. said, "Wow. She's hot. I would do her."

A week or so later, defendant received a text message from R.W. that said, "Hey, Rick. I just did your girlfriend." Defendant thought R.W. was playing around and referring to defendant's fictional girlfriend. When defendant showed the message to Mother, she said, "He just wants you to think he's cool. Just play along with him." Defendant therefore decided to "play along" and to "try[] to bond with him" by responding with sexual and vulgar messages. He acknowledged it was "wrong" to send such messages to an 11-year-old and said he regretted it.

Defendant also testified regarding R.W.'s misconduct, including stealing alcohol, a pocketknife, and a lighter from Father's house, and lying about it. Defendant claimed

that the message in which he suggested having sex with Mother on a Saturday was inconsistent with R.W.'s schedule because R.W. spent weekends with Father. Defendant denied knowing that Mother had sex with R.W. and denied ever watching the two have sex.

Defendant's adult sons also testified for the defense. One son contradicted some of R.W.'s testimony. For example, he denied he ever asked R.W. to steal alcohol from Father's house—a claim R.W. initially made to avoid responsibility. Defendant's other son testified that he lived in defendant's house with R.W. and his family but did not see anything suggesting Mother or defendant had sexual contact with R.W.

A jury convicted defendant on all counts. The trial court sentenced him to 16 years in prison, consisting of the eight-year high term on the first count and one-third of the middle term on the four remaining counts, all to run consecutively.

DISCUSSION

Prior Misconduct

Defendant contends the trial court abused its discretion and "rendered the trial unfair" by excluding certain testimony regarding R.W.'s prior misconduct. We reject his contention.

Defendant's son Robert Groseclose (Robert), who was 42 years old in 2014, was prepared to testify that R.W. held a knife to his throat on two occasions. Robert was "a little lighter with [R.W.]" the first time, but the second time, R.W. was "more aggressive," and Robert "got far more stern and told [R.W.] he better never do that again . . . ." Robert also warned R.W. that what he was doing was not a joke.

Defense counsel argued the evidence was admissible for the following reasons: "I think, one, it's moral turpitude. Putting knives to [p]eople's throat . . . . It's admissible under Wheeler in the constitution. [¶] Number two, what it also explains here is that, socially, this minor was advanced beyond his age. It gives some context that in the coarseness of his behavior why [defendant] would send him these vulgar text messages. The sort of picture that is being laid is this kind of chaste ten-year-old being . . . the prey and everybody else being the predators. And it's to rebut that testimony and bolster other

testimony about him . . . knowing a lot about the world and the risque and the tawdry parts of the world that I think the jury needs to hear in order for [defendant] to get a fair trial." Counsel also argued the conduct showed R.W. "was not acting as a normal 11-year-old would be in a house. And that kind of person would be more likely to fabricate [defendant's] direct involvement . . . ."

The prosecutor disagreed, stating the acts were "not relevant at all to the charged conduct. It's basically just a character assassination on R.W. that he is violent . . . ." "[I]t's a giant leap of relevancy, the fact that he held a knife to someone's throat versus that he's making this whole story up."

The trial court excluded the evidence under Evidence Code section 352, stating: "It's not dishonest or untruthful conduct. It is potentially conduct of moral turpitude, but it's not like stealing or telling a lie. It's unadjudicated. He was 11 years old at the time. You have to kind of consider on these conducts of moral turpitude, particularly unadjudicated conduct, minors under the age of 14 I think are presumed to be incapable of committing crimes. I think that's Penal Code 20 or 26. Somewhere in that area. [¶] It seems somewhat collateral to the issue of his honesty or truthfulness. It's a bit speculative that translates him to be more likely to lie because he's not acting normally. There's already abnormal conduct in the record. And I think on something like this it's almost classic 352. There's a real danger the jury might consider it for irrelevant or speculative purposes. They are unrelated to the probative value that it might have. I'm going to exclude it."

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Assault with a deadly weapon is a crime of moral turpitude because someone who attempts to injure another with a deadly weapon " 'is guilty of some degree of moral laxity.' " (*People v. Rivera* (2003) 107 Cal.App.4th 1374, 1381.) " 'Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a

witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352.' " (*People v. Smith* (2007) 40 Cal.4th 483, 512.) "[T]he balancing process mandated by section 352 requires 'consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion.' " (*People v. Wright* (1985) 39 Cal.3d 576, 585.)

Additional considerations apply when the proffered impeachment evidence is misconduct, as opposed to a prior conviction. (*People v. Clark* (2011) 52 Cal.4th 856, 931.) "This is because . . . misconduct generally is less probative of immoral character or dishonesty [than a prior conviction] and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude." (*Id.* at pp. 931–932.) " '[C]ourts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.' " (*Id.* at p. 932.)

"[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296, superseded by statute on other grounds as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) Because the court's discretion to admit or exclude impeachment evidence "is as broad as necessary to deal with the great variety of factual situations in which the issue arises" (*People v. Collins* (1986) 42 Cal.3d 378, 389), a reviewing court ordinarily will uphold the trial court's exercise of discretion. (*Ibid.*; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125 [the trial court is best situated to evaluate the evidence and therefore enjoys broad discretion]; *People v. Allen* (1986) 42 Cal.3d 1222, 1255–1256 [the trial court's exercise of discretion will not be disturbed on appeal absent a clear abuse].)

Here, R.W.'s asserted conduct was not particularly probative to the issues of his credibility or whether he was mature beyond his age. The conduct was never adjudicated or proven, and it was unclear whether it was intended as anything other than a bad joke, lacking in any criminal intent. R.W.'s young age suggested he was not likely to have

appreciated the meaning of the alleged acts in the way an adult would. (See § 26 [persons capable of committing crimes; exceptions for minors 14 and under].) Further, as the trial court stated, it was "a bit speculative" to say that R.W. was more likely to fabricate the sexual abuse because he was acting aggressively or because he was not acting as a normal 11-year-old would.

Balanced against this minimal probative value was the probability that the admission of this evidence would have necessitated "undue consumption of time" and/or would have confused the issues or misled the jury. (Evid. Code, § 352.) It would have required a mini-trial over such issues as whether the knife incidents actually occurred, the circumstances under which they occurred, and R.W.'s intent. Evidence Code section 352 "empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 296.) The trial court was reasonably concerned that the details of these incidents would have distracted the jury and potentially led to undue prejudice and confusion of issues. (See *People v. Hamilton* (2009) 45 Cal.4th 863, 930 [trial court did not abuse its discretion under Evidence Code section 352 by excluding evidence of limited probative value that "would have required 'a mini-trial' "].) The court did not abuse its discretion in excluding the evidence under Evidence Code section 352.

We further conclude that the exclusion of the evidence did not "render[] the trial unfair." In general, the " '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' " (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103.) Even though the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. (*Id.* at p. 1103.)

Here, as we have concluded, the unadjudicated and unproven acts of an 11-year-old boy were not of "*significant* probative value" to the defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999 [Evidence Code section 352 "must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant*

probative value to his or her defense"].) Defendant argues he was precluded from presenting evidence relating to R.W.'s credibility and maturity beyond his age, but he was in fact allowed to present such evidence through other means. For example, the defense thoroughly cross-examined R.W. and challenged his credibility. It also elicited other evidence to support an inference of his untruthfulness or of his maturity, including: his theft of alcohol, a pocketknife, and a cigarette lighter; the lies regarding the thefts; two school suspensions; his use of crude and mature language; and his admission that he sought out, and watched, hours of pornography on the Internet. The exclusion of the evidence did not deprive defendant of his right to a fair trial.

Sufficiency of the Evidence

Defendant contends there was insufficient evidence to support the conviction on all five counts. We reject his contention.

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738–739.)

As noted, R.W. testified there were "[f]our or five" occasions in which defendant's text messages prompted Mother to make him have sex with her. In addition, he testified about having sex with Mother while defendant watched from the corner of the room. There were two text message exchanges clearly showing R.W. had sex with Mother after defendant had urged him to do so, and another message in which defendant urged R.W. to "do it again stud[.]" In a fourth message, defendant told R.W. to talk to Mother about "plan[ning] another Saturday" for them to "both do her[.]"

Moreover, R.W. testified that there were more text messages showing him complying with defendant's instructions to have sex with Mother, and that he deleted those messages upon being instructed by Mother to do so. The jury also heard testimony

from an investigative officer who explained why deleted messages may not be recoverable. Defendant argues "the jury had no way to know if 'four or five' meant 'four,' or 'five,' or some other number," but viewing the evidence in the light most favorable to the prosecution, we conclude there was sufficient evidence from which the jury could find beyond a reasonable doubt that defendant engaged in five lewd acts upon R.W.

Sentencing

Defendant contends the trial court should have stayed the consecutive sentences on four of the five counts. We disagree.

A trial court "often has broad discretion to tailor the sentence to the particular case," including whether "to impose consecutive rather than concurrent sentences . . . ." (*People v. Scott* (1994) 9 Cal.4th 331, 349–350.) The court's decision "will be affirmed on appeal, so long as it is not arbitrary or irrational and is supported by any reasonable inferences from the record." (*People v. King* (2010) 183 Cal.App.4th 1281, 1323.) "The party attacking the sentence must show the sentencing decision was irrational or arbitrary and if it fails to do so, ' "the trial court is presumed to have acted to achieve legitimate sentencing objectives . . . ." ' " (*Ibid.*)

California Rules of Court, rule 4.425, sets forth the criteria a trial court considers in determining whether to impose consecutive or concurrent sentences, including (1) whether the "crimes and their objectives were predominantly independent of each other"; (2) whether the "crimes involved separate acts of violence or threats of violence"; and (3) whether the "crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(1)–(3).) "Only one criterion is necessary to impose a consecutive sentence." (*People v. King*, *supra*, 183 Cal.App.4th at p. 1323.)

Defendant argued—as he does on appeal—that he should not be sentenced consecutively because he committed all of the crimes "for the same criminal objective,"

i.e., to aid Mother.[3] The trial court disagreed, stating, "These crimes all occurred on separate occasions. They were separate acts."

We agree the crimes were separate acts and/or were committed at different times. Each text message defendant sent that resulted in Mother having sex with R.W. was a separate act that occurred at a different time. R.W. testified that his sexual encounters with Mother—which continued throughout the time Mother and defendant were in a relationship—occurred on separate occasions, usually separated by about a week. The text message exchanges also showed the offenses occurred at different times, and that they were not "committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(3).) The court did not abuse its discretion in imposing consecutive sentences.

DISPOSITION

The judgment is affirmed.

[3] Defendant acknowledges that section 654 does not bar imposition of multiple punishments for multiple sex acts on the same victim. (*People v. Perez* (1979) 23 Cal.3d 545, 553.)

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Wiseman, J.*

WE CONCUR:

_____
Siggins, P. J.

_____
Petrou, J.

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.